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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1154

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Dr. Helen A. Cohen, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above case.

Opinions Below

The opinion of the Court of Appeals for the Seventh Circuit, affirming the judgment of dismissal rendered by the United States District Court for the Northern District of Illinois, Eastern Division, has been reported at 524 F.2d 818, and is set out in the Appendix, at pp. 1a-16a.

The order and opinion of the Court of Appeals denying rehearing and rejecting a suggestion for hearing *en banc* has been reported at 524 F.2d 818, 830, and is set out in the Appendix at pp. 17a-18a.

The original opinion of the District Court is reported at 384 F.Supp. 202, and is set out in the Appendix at pp. 19a-24a.

Jurisdiction

The Judgment of the Court of Appeals for the Seventh Circuit was entered on October 28, 1975. A timely petition for rehearing and suggestion for hearing *en banc* was denied on November 26, 1975. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Questions Presented

Regarding Certiorari Policy:

1. *As to 42 U.S.C. §1983:* This Court, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and in *Norwood v. Harrison*, 413 U.S. 455 (1973), held that where the state is significantly involved with a private institution, the state becomes a joint participant with the institution in conduct prohibited by the Equal Protection Clause through § 1983. The overwhelming majority of the lower courts, most recently the Second Circuit in *Weise v. Syracuse University*, 522 F. 2d 397 (2 Cir. 1975), holds that "significant" or "substantial" state support of such an institution, alone and by its very nature, meets the "state action" requirement of 42 U.S.C. § 1983. A small minority, now joined by the decision below, are holding that "significant" support is not enough; a plaintiff must, in addition, establish that the support has actually "furthered the specific policies or conduct under attack." Should not this Court grant certiorari, pursuant to its Rule 19(b), to resolve the conflict between the decision below and decisions of this Court, and between the decision below and decisions of other Circuits?

2. *As to 42 U.S.C. § 1985(3):* This Court, in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), expressly left open the question whether, and to what extent, Section 5 of the Fourteenth Amendment would extend the constitutional reach of § 1985(3). Courts of appeals in at least two other Circuits have, by virtue of Section 5, held that § 1985(3) covers private conspiracies to cause gender-based or other invidious discrimination—even in

the absence of direct state or federal involvement. Other Circuits have reached the same result without specific reliance on Section 5, including the decision in *Weise, supra.* The Seventh Circuit disagrees—the case at bar expressly declined to follow *Weise* and one other appellate holding and distinguished two other appellate holdings. Should not this Court grant certiorari to resolve the conflict among the Circuits and to decide the important question of the applicability of 42 U.S.C. § 1985(3), by virtue of Section 5 of the Fourteenth Amendment, to private conspiracies?

On The Merits:

1. *As to 42 U.S.C. § 1983:* Whether the invidiously discriminatory actions of a formally private institution which, *inter alia*, receives "significant" state support can be redressed under 42 U.S.C. § 1983 without establishing that the support has actually furthered the discriminatory policies, conduct, or acts?

2. *As to 42 U.S.C. § 1985(3):* Whether a private conspiracy to cause invidious discrimination in private employment is within the reach of 42 U.S.C. § 1985(3) by virtue of Section 5 of the Fourteenth Amendment, particularly where the state has an enactment prohibiting such discrimination and where the state provides significant support to the employer?

Constitutional Provisions And Statutes Involved

This case involves the Fourteenth Amendment, Sections 1 and 5, of the Constitution of the United States;[1] Article I, Sections 2 and 17, of the Constitution of the State of Illinois;[2] and Title 42, U.S. Code Sections 1983 and 1985(3).[3]

[1]U.S. CONST. amend. XIV, §§ 1 and 5

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[2]ILL. CONST. art. I (1970) (effective July 1, 1971):

§ 2. Due Process and Equal Protection

No person shall be deprived of life, liberty or property without due process of law nor be denied the equal protection of the laws.

§ 17. No Discrimination in Employment and the Sale or Rental of Property

All persons shall have the right to be free from discrimination on the basis of race, color, creed, national ancestry and sex in the hiring and promotion practices of any employer or in the sale or rental of property.

These rights are enforceable without action by the General Assembly, but the General Assembly by law may establish reasonable exemptions relating to these rights and provide additional remedies for their violation.

[3]42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United

(Footnote continued on following page)

Statement Of The Case

This case comes before the Court on concurrent decisions below dismissing the complaint for failure to state a claim under the Civil Rights Act, 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3). Jurisdiction in the district court was founded on 28 U.S.C. § 1343 and under pendent jurisdiction.

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[3] *Continued*

States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

42 U.S.C. § 1985. Conspiracy to interfere with civil rights—Preventing officer from performing duties

Depriving persons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.
R.S. § 1980.

Petitioner, Dr. Helen A. Cohen, a female, in each of the years 1969, 1970 and 1971 was denied a tenured promotion to the senior academic rank of associate professor by her then-employer, respondent Illinois Institute of Technology (hereinafter "IIT"). Under the school's tenure-promotion rules, failure to achieve promotion within a designated time meant termination. The school continues to refuse to employ petitioner. There is no need to discuss the specifics further; suffice it to say that the court of appeals concluded that a "victim of comparable discrimination occurring today would clearly have a remedy under [subsequently enacted] statutes." (App. 3a).

Petitioner filed charges with the U.S. Department of Labor's Office of Federal Contract Compliance ("OFCC"), asserting discrimination on the basis of sex in violation of Executive Order No. 11246 as amended by Executive Order No. 11375. The OFCC compliance agency, the Department of Health, Education and Welfare, found "reasonable cause to believe that complainant was terminated in part because of her sex . . . [and] was discriminated against because of her sex . . . [by being] paid . . . less than the salary of similarly situated males."

Enforcement action by the OFCC not being forthcoming, petitioner brought suit in the U.S. District Court on three counts: under 42 U.S.C. § 1983, under 42 U.S.C. § 1985(3), and under the Illinois Constitution through pendent jurisdiction. Her complaint asserted, *inter alia*, that IIT, although formally private, was so involved with the State of Illinois that the acts of IIT are subject to the scrutiny of the Fourteenth Amendment. The individual defendants are the policy-making executive of IIT.

The district court dismissed the complaint under Rule 12, FED.R.CIV.P., holding that, as to the § 1983 count, petitioner did "not allege the equivalent of state action within the meaning of § 1983" (App. 19a.). Specific allegations of state control were held "not to make [IIT] a State institution or agency with respect to the tenure and salary of its academic staff" (App. 21a.). As to the § 1985(3) count, the district court held that "§ 1985(3) requires . . . 'state action' . . ." (App. 23a.). The pendent jurisdiction count was accordingly dismissed.

The Court of Appeals for the Seventh Circuit affirmed, although on different grounds. As to the § 1983 count, it examined the allegations of state involvement with IIT and concluded that "the State has lent significant support to IIT; it is not, however, alleged to have lent any support to any act of discrimination" (App. 8a-9a.). As to the § 1985(3) count, it held that the statute in terms would cover a private conspiracy to discriminate on the basis of gender but, absent state involvement, the statute could not constitutionally reach such a conspiracy.

A petition for rehearing and suggestion for rehearing *en banc* was filed. Petitioner argued that the court had neither cited nor applied *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Norwood v. Harrison*, 413 U.S. 455 (1973), neither of which had required any nexus between state involvement and the discriminatory act. Second, petitioner noted that the Seventh Circuit's interpretation of § 1985(3) failed to take into account Section 5 of the Fourteenth Amendment, and thus was contrary to decisions in at least three, and perhaps as many as six, other Circuits.

Rehearing was denied in an unsigned Order and opinion (App. 17a-18a). Still not citing *Burton*, the court distinguished *Norwood* on the ground that it "did not involve the question whether action . . . was under color of state law" (App. 18a). As to the conspiracy count under § 1985(3), it said "our opinion assumed for the purpose of decision that Congress has ample power to enact a statute having the coverage urged by petitioner but concluded that § 1985(3) is not such a statute" (App. 18a).

Reasons For Granting The Writ

The decision of the court below raises two substantial issues as to the scope of the Constitution's equal protection guarantees. In the words of one columnist,[4] it "narrow[s] the use of . . . the civil rights law" affecting discrimination in the employment of women, particularly in senior faculty positions in colleges and universities—perhaps the last major outpost of pervasive gender-based discrimination. In so doing, the decision imposes burdens of pleading and proof under 42 U.S.C. § 1983 that are contrary to decisions of this Court and of many other courts of appeals. It interprets 42 U.S.C. § 1985(3) in a manner contrary to holdings in at least three, and arguably at least six, other Circuits. These unfair and unseemly conflicts merit immediate resolution by this Court.

[4] Isaacs, Washington Post, November 29, 1975, p. A. 5.

1.

THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF THIS COURT AND OF NUMEROUS LOWER COURTS ON WHAT CONSTITUTES "STATE ACTION" UNDER 42 U.S.C. §1983.

The various courts of appeals are hopelessly split as to whether a state's giving "significant" aid to an otherwise-private institution that engages in invidious discrimination is, by itself, sufficient state action to invoke 42 U.S.C. § 1983. The majority—and this Court—holds that it is. A minority, now joined by *Cohen*, imposes an additional requirement: there must be a nexus between the state support and the discriminatory policies or acts.

This Court, in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), held that a symbiotic relationship between a private institution and the state subjects discriminatory acts of the former to the scrutiny of the Fourteenth Amendment through § 1985. In *Norwood v. Harrison*, 413 U.S. 455 (1973), the state's furnishing of textbooks to discriminatory private schools was condemned: "if the school engages in discriminatory practices the State by tangible aid . . . thereby gives support to such discrimination." (413 U.S. at 464, 465).

An overwhelming majority of courts have adopted the rule that state support, alone and by its very nature, puts the state in cahoots with private discrimination. *Weise v. Syracuse University*, 522 F.2d 397 (2 Cir. 1975), is a recent example. The *Weise* court, relying on *Burton*, concluded that "a substantial degree of financial dependence has been alleged," and on this basis alone ordered the case remanded for hearing on the disputed (in the briefs) extent of that support. To the same effect are *Braden v. University of Pittsburgh*, 477 F.2d 1 (3 Cir. 1973); *Isaacs v. Board of Trustees of Temple University*,

385 F. Supp. 473, 490, 491 (E.D. Pa. 1974); *Rackin v. University of Pennsylvania*, 386 F. Supp. 992, 1002-1005 (E.D. Pa. 1974); *Hammond v. University of Tampa*, 344 F.2d 951 (5 Cir. 1965); *Golden v. Biscayne Bay Yacht Club*, 521 F.2d 344 (5 Cir. 1975) (with dissent on this issue). Legal commentators are also in agreement.[5]

However, a small minority, now joined by *Cohen*, takes a contrary view. Quoting language from *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 177, 178 (1972), in which this Court used the phrase "foster or encourage racial discrimination," or from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350 (1974), where it spoke of "a sufficiently close nexus between the State and the challenged action," the minority overlooks the fact that *Moose Lodge* and *Jackson* were concerned with state regulation, not support. The *Cohen* court, without even citing *Burton* or *Norwood*, derived a rule requiring an "allegation of state support or approval of the defendant's discriminatory conduct" (App. 11a), or "that support has furthered the specific policies or conduct under attack" (App. 8a), or an "alleg[ation of] support to any act of discrimination." (App. 9a).

This minority rule, we submit, cannot be squared with this Court's holdings in *Burton*, *Norwood*, nor other cases where significant state or federal support of discriminatory institutions has been attacked, *e.g. Coit v.*

[5] "It is difficult to see, however, how a general grant does not support and relate directly to every activity of the enterprise; and the overwhelming body of case law makes no such distinction." Elkind, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L.REV. 656, 674 (1974). "Such a requirement [of direct governmental involvement in the activity under challenge] suggests, for example, that if a southern state university could find a donor willing to endow a chair for the director of admissions, it might refuse black students with complete impunity." O'Neil, *Private Universities and Public Law*, 19 BUFF. L. REV. 155, 160 n. 21 (1970).

Green, 404 U.S. 997 (1971). Nor can it be squared with logic. It would allow a state to contribute half or even more of the funds of a "private" institution and still be outside § 1983. Hypothetical? Not at all. See *Junior Chamber of Commerce of K. C., Mo. v. Missouri State J.C. of C.*, 508 F.2d 1031 (8 Cir. 1975) (2:1 decision). Or, indeed, see *Cohen*.

No reason is apparent, and none should be condoned, why a private institution should be able to accept "significant" state support and yet be free to engage in invidious discrimination. It cannot be done in most of the Circuits, yet it can be in the Eighth and, now, in the Seventh. The conflict fairly begs for resolution.

2.

THE DECISION BELOW IS INCONSISTENT WITH DECISIONS OF ALL OTHER LOWER COURTS ON THE SCOPE OF 42 U.S.C. § 1985(3).

If lower court decisions[6] concerning private discrimination under 42 U.S.C. § 1983 are in conflict, those involving 42 U.S.C. § 1985(3) are in chaos. The conspiracy count of the present complaint would be sustained in the Second Circuit, the Third, the Fifth (until its opinion was withdrawn as moot), and the Eighth (*en banc*); perhaps would be sustained in the Fourth; would be sustained by one district court in the Ninth; and would find support in language in decisions of the First and Sixth Circuits.[7] The Seventh Circuit stands alone.

[6] From 1971 through 1974 there were only two appellate decisions and one *dictum*. In 1975 four more appellate holdings were reported. In 1976, in the Seventh Circuit alone, six more cases will be argued on one day.

[7] The First Circuit in *Harrison v. Brooks*, 446 F.2d 404, 407-409 (1971), and the Sixth in *Cameron v. Brock*, 473 F.2d 608, 610 (1973), used language indicating that § 1985(3) would reach all invidiously discriminatory private conspiracies even in the absence of state action, but the facts of both cases show direct state involvement.

No better indication of the disarray among the lower courts is provided than by the three decisions in *Cohen*. The district court held that § 1985(3) "requires . . . 'state action' " (App. 23a), *Griffin v. Breckenridge*, 403 U.S. 88 (1971), to the contrary notwithstanding. The main opinion of the court of appeals held that § 1985(3) in terms covers a private conspiracy to discriminate on the basis of gender, but that the statute could not constitutionally reach it absent direct state involvement (App. 14a-15a). When we pointed out that the court had never adequately considered Section 5 of the Fourteenth Amendment—and that in the present case there were two forms of state involvement, the providing of significant aid and the presence of an impotent state constitutional enactment—the unsigned opinion denying rehearing made a double reverse. It said that the main opinion had "assumed" § 1985(3) could constitutionally reach a private conspiracy, but that the statute did *not* cover it (App. 18a).

This Court in *Griffin* held that § 1985(3) could reach private conspiracies where there was an invidiously discriminatory animus (403 U.S. at 102). But it stated the necessity of "consider[ing in each case] whether Congress had constitutional power to enact a statute that imposes liability under federal law for the conduct alleged" (403 U.S. at 103). Power was found in *Griffin* under the Thirteenth Amendment and under the federal right to travel, but this Court expressly left open the question whether Section 5 of the Fourteenth Amendment could provide the necessary constitutional tie. And therein lies the problem.

Section 5 is due for this Court's re-examination. *United States v. Guest*, 383 U.S. 745 (1966), with its three concurring opinions—none commanding majority support—remains the last word. As a 1973 Library of

Congress publication[8] puts it: "It is not clear whether this expansion of Congress' power still commands a majority of the Court;" "It is not clear what the limit and potentialities of the expansion are;" and "It is not clear . . . what 'rights' are reasonably and properly encompassed within the concept 'Fourteenth Amendment' rights."

Lower court decisions under § 1985(3) reflect this uncertainty with an almost unprecedented confusion. Some seven Circuits have treated with the application of § 1985(3) to invidiously discriminatory private conspiracies, where there was no state or federal involvement.

Second Circuit—§ 1985(3) reaches denial of equal protection; no ascertainment of constitutional basis. *Weise v. Syracuse University*, 522 F.2d 397, 408 (1975).

Third Circuit—it reaches denial of equal protection; no ascertainment of constitutional basis. *Richardson v. Miller*, 446 F.2d 1247, 1249 (1971). Several district courts have followed *Richardson*. See *Commonwealth v. Local Union No. 542*, 347 F. Supp. 268, 287-297 (E.D. Pa. 1972); *Stern v. Massachusetts Indemnity And Life Insurance Co.*, 365 F. Supp. 433, 442, 443 (E.D. Pa. 1973); *Brown v. Villanova University*, 378 F. Supp. 342, 344, 345 (E.D. Pa. 1974); *Pendrell v. Chatham College*, 386 F. Supp. 341, 346-348 (W.D. Pa. 1974). *Commonwealth*, an extended scholarly opinion, expressly relied on Section 5.

Fourth Circuit—it does not reach denial of First Amendment rights; the majority (according to the dis-

[8] "The Constitution of the United States of America, Analysis and Interpretation," 92nd Cong., 2d Sess., Document 92-82, p. 1535 (1973).

sent) would hold that it could reach Fourteenth Amendment rights. *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504 (1974).

Fifth Circuit—it reaches denial of First Amendment rights and *a fortiori* Fourteenth Amendment rights; reliance bottomed squarely on Section 5. *Westberry v. Gilman Paper Co.*, 507 F.2d 206 (1975), opinion withdrawn as moot, 507 F.2d at 216.

Seventh Circuit—it does not reach equal protection unless there is state involvement in the right protected; it might reach First Amendment rights; Section 5 has not been considered. *Dombrowski v. Dowling*, 459 F.2d 190 (1972); *Lesser v. Braniff Airways, Inc.*, 518 F.2d 538 (1975); *Cohen v. Illinois Institute of Technology*, 524 F.2d 818 (1975).

Eighth Circuit—it reaches First Amendment rights and *a fortiori* Fourteenth Amendment rights; specific reliance on Section 5. *Action v. Gannon*, 450 F.2d 1227 (1971) (*en banc*).

Ninth Circuit—no appellate cases. One district court held it reaches denial of equal protection, relying on Section 5. *Reichardt v. Payne*, 396 F. Supp. 1010, 1016-1018 (N.D. Cal. 1975).

The conflicts have been acknowledged by the lower courts. The main opinion in *Cohen* expressly declined to follow the Second Circuit's *Weise* and the Third Circuit's *Richardson* decisions on the ground that they were "without careful consideration of the [constitutional] issue." (App. 14a). It distinguished the Eighth Circuit's *Action* and the Fifth Circuit's *Westberry* decisions solely as they involved First Amendment rights which are "often accorded special deference." (App. 15a) When we pointed out on petition for rehearing that *Action* and

Westberry (and the district court decision in *Commonwealth v. Local Union 542*) had in fact carefully considered the constitutional issue and had found support in Section 5 of the Fourteenth Amendment—which the Seventh Circuit in three decisions had not examined—the decision denying rehearing summarily concluded that those cases "do not conflict with our holding." (App. 18a)

In turn, a district court in the Ninth Circuit, *Reichardt v. Payne, supra*, severely criticized the Seventh Circuit's *Dombrowski* and the Fourth Circuit's *Bellamy* decisions as they "unnecessarily narrow the holding of *Griffin*," (396 F. Supp. at 1017).

The situation is intolerable. As matters now stand, a person's right of access under 42 U.S.C. § 1985(3) to redress invidiously discriminatory private conspiracies depends on what Circuit the defendants reside in. The need for uniformity is manifest.

3.

THE HOLDING RESTRICTS ACCESS TO THE COURTS TO REDRESS GENDER-BASED DISCRIMINATION IN COLLEGES AND UNIVERSITIES, AN AREA WHERE OTHER CIVIL RIGHTS REMEDIES ARE VIRTUALLY POWERLESS.

What is so disturbing about *Cohen* is that, by its narrow interpretations of § 1983 and § 1985(3), it significantly restricts the right of all victims of discrimination, not only women in higher education, to obtain an effective civil rights remedy. Although the opinion said that "the victim of comparable discrimination occurring today would clearly have a remedy under either of [Title VII of the Federal Civil Rights Act of 1964, as amended, or the Illinois Fair Employment Practices Act]," this assumption is entirely unfounded.

Apart from actions brought under 42 U.S.C. § 1983 and § 1985(3), today's victim of comparable discrimination has essentially four civil rights remedies. First, proceedings under Executive Order No. 11246, as amended, to terminate or suspend federal grants and contracts. Second, administrative action by the Equal Employment Opportunity Commission under Title VII. Third, a private suit under Title VII. And fourth, whatever state remedies may exist.

All four, except for rare and notable exceptions, are at best limited and, in the case of colleges and universities, are virtually nonexistent. Within the past year a series of monumental studies by the United States Commission on Civil Rights ([9], [10]), by the House Committee on Education and Labor ([11], [12], [13]), and by the General

[9] United States Commission on Civil Rights, "The Federal Civil Rights Enforcement Effort—1974," Volume III, "To Insure Equal Education Opportunity," January 1975 (396 pages).

[10] United States Commission on Civil Rights, "The Federal Civil Rights Enforcement Effort—1974," Volume V, "To Eliminate Employment Discrimination," July 1975 (673 pages).

[11] Hearings, Special Subcommittee on Education, Committee on Education and Labor, House of Representatives, 93rd Cong., 2nd Sess., "Federal Higher Education Programs, Institutional Eligibility," Part 2A, "Civil Rights Obligations," 1975 (747 pages); Part 2B Appendix, "Civil Rights Obligations," 1975 (pages 750-1418).

[12] Hearings, Subcommittee on Postsecondary Education, Committee on Education and Labor, House of Representatives, 94th Cong., 1st Sess., "Sex Discrimination Regulation," "Review of Regulations to Implement Title IX of Public Law 92-318 Conducted Pursuant to Sec. 431 of the General Education Provisions Act," 1975 (664 pages).

[13] Hearing, Subcommittee on Equal Opportunities, Committee on Education and Labor, House of Representatives, 94th Cong., 1st Sess., "Hearing on House Concurrent Resolution 330 (Title VII Regulation)," 1975 (71 pages)

Accounting Office,[14] uniformly concluded that ". . . the Federal effort to end employment discrimination based on sex, race, and ethnicity is fundamentally inadequate" (note 10—letter of transmittal), and "has not been equal to the task" (note 10 at p. 617). Institutions of higher education, once considered the great hope of the movement toward equal opportunity, are recognized as being a part of the problem rather than of the solution (note 9 at p. 304).

To illustrate:

The Executive Orders, which require all contractors having contracts with the Federal government to agree not to discriminate in employment on the basis of race, color, sex, religion, or national origin, and to adopt an affirmative action program, are supposedly enforced as to institutions of higher education by the Department of Health, Education and Welfare, the compliance agency designated by the OFCC of the Department of Labor (note 9 at p. 195). Approximately one thousand colleges and universities are covered (note 9 at p. 199). Yet HEW has "repeatedly permitted civil rights violations by colleges and universities to continue without imposing sanctions" (note 9 at p. 370; *see also* pp. 355 and 393), opting instead to rely on "voluntary negotiations . . . over protracted time periods" (note 9 at p. 355; *see also* pp. 370, 371). HEW has no time limitations by which colleges and universities must take acceptable corrective action, even though OFCC specifies 90 days (note 9 at p. 380; *see* p. 392). It "has failed to handle complaints ade-

[14] Report by the General Accounting Office for the Subcommittee on Fiscal Policy of the Joint Economic Committee, 94th Cong., 1st Sess., "The Equal Employment Opportunity Program for Federal Nonconstruction Contractors Can Be Improved," May 1975 (89 pages).

quately . . . it affirmed the compliance status of a number of colleges and universities without investigations or resolving all of the outstanding complaints against those institutions" (note 9 at p. 371; *see* p. 393). Studies show that the proportion of women on college faculties either increased imperceptibly, or actually decreased, from 1968 to 1973 (note 9 at p. 305). The Commission on Civil Rights found:

> "Clearly, the promise of equal employment opportunity has not been achieved in institutions of higher education; HEW's failure to enforce the Executive orders has played no small role in frustrating this objective." (note 9 at p. 305).

It recommended that, "In view of the deficiencies noted . . . [OFCC] should consider revoking the authority it has delegated to HEW for enforcing the Executive order with respect to institutions of higher education" (note 9 at p. 393; *see* note 10 at p. 663).

One paragraph disposed of EEOC's effectiveness, either through administrative concilliation or through suit by its own counsel:

> "The median period of time required for the resolution of an EEOC charge, from receipt to final disposition, is 32 months. The process takes so long because of delays caused by EEOC's enormous backlog of charges. The backlog has increased from 53,410 as of June 30, 1972, to 79,783 as of June 30, 1973, and 98,000 as of June 30, 1974. By March 1975 the backlog had apparently exceeded 100,000." (note 10 at p. 529)

The Chicago office was singled out:

> "Considering that the Chicago region already had a backlog of 7,086 at the beginning of fiscal 1973 and that the investigators completed only 788 in-

> vestigations, it is easy to see how this figure rose to 13,190 by the end of the year . . ." (note 10 at p. 531).

As for the private right to sue under Title VII, EEOC is required by the Act (note 10 at p. 519-521, 535) to issue a right-to-sue notice to parties whose charges have been pending for more than 180 days without successful concilliation (note 10 at p. 519). Congress intended this "so that complaints would not languish due to EEOC's inaction" (note 10 at p. 521). Nevertheless, the Commission reported:

> "In practice, EEOC does not issue these right-to-sue notices unless they are requested. . . . By not systematically issuing these notices at the expiration of 180 days, EEOC is not only disregarding Title VII, but it is denying complainants an alternative to its lengthy administrative process." (note 10 at p. 644).

State equal employment efforts are no improvement. As the Commission found:

> "Pursuant to Title VII, EEOC defers charges it receives to qualified State and local fair employment practices agencies for a 60-day period. The process has not been productive, however, because the preponderance of these charges are routinely returned by the agencies, unprocessed, at the end of the period." (note 10 at p. 646).

Otherwise stated, it would have been more accurate for the court below to have observed that the victim of comparable discrimination today has no other *effective* remedies than the victim of discrimination some 100 years ago. For this reason alone, we respectfully submit that the restrictive and retrogressive interpretations placed on § 1983 and § 1985(3) by the court below should not be countenanced by this Court. Damage to over 100

years of civil rights progress is too high a risk to take by permitting *Cohen* to remain law.

4.

THE DECISION BELOW HAS ATTAINED NATIONAL PROMINENCE; IT IS PARTICULARLY IMPORTANT THAT IT BE CONFORMED TO THE LAW IN THIS COURT AND IN OTHER CIRCUITS.

Contrary to the understandable reticence of both parties, this case has received extensive nationwide publicity. Within days of the court of appeals decision its author, Judge (now Mr. Justice) Stevens, was nominated to the U.S. Supreme Court. The only opposition to his appointment came from womens' rights groups, and the focus of their challenge was *Cohen v. Illinois Institute of Technology.*

"Cohen v. Illinois Institute of Technology involved [Judge] Stevens' narrowing the use of a section of the civil rights law."[15] Insofar as women in the Seventh Circuit are concerned, the section (actually sections) has been narrowed to the point of inaccessibility.

The appointment of the author of the *Cohen* opinion to this bench magnifies the need for this Court's review. No longer can the holdings of the Seventh Circuit be dis-

[15] Isaacs, Washington Post, November 29, 1975, p. A. 5.

missed simply as being in the minority under 42 U.S.C. § 1983[16] and under 42 U.S.C. § 1985(3).[17] The prestige of the author of *Cohen* has now made the decision a leading one in the civil rights field.

In this instance, it is specially important that the law be both settled and settled right.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[16] Elkind, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 657, 671 (1974).

[17] *Reichardt v. Payne*, 396 F. Supp. 1010, 1017 (N.D. Cal. 1975).

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 74-1930

HELEN A. COHEN,

Plaintiff-Appellant,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 74 C 1374
THOMAS R. MCMILLEN, *Judge*

ARGUED APRIL 4, 1975 — DECIDED OCTOBER 28, 1975

Before MCALLISTER, *Senior Circuit Judge,** and SWYGERT and STEVENS, *Circuit Judges.*

STEVENS, *Circuit Judge.* This is the first case in which this circuit has been asked to decide whether the executives of a private university, which allegedly discriminated against women in the appointment, retention and compensation of its faculty, were acting under color of state law within the meaning of 42 U.S.C. § 1983[1] or were partici-

* Senior Circuit Judge Thomas F. McAllister of the United States Court of Appeals for the Sixth Circuit is sitting by designation.

[1] "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

pating in a conspiracy prohibited by § 1985(3).[2] The appeal is from an order dismissing a complaint alleging detailed facts which we assume to be true.

For five years, commencing in the fall of 1966, plaintiff served as an Assistant Professor in the Department of Psychology and Education of the Illinois Institute of Technology ("I.I.T."). In March of 1969, and in 1970 and 1971 as well, the head of her department recommended that she be promoted to Associate Professor, a tenured position. Every year this recommendation was denied for no stated reason. Plaintiff alleges that each "denial was in fact based solely on Plaintiff's being a woman."

In March of 1971, defendant Rettaliata, the President of I.I.T., advised Dr. Cohen that she would not be offered a tenured appointment, and therefore the ensuing year would be her last. Unwilling to continue in an untenured status, plaintiff resigned and requested a statement of reasons for refusing to grant her tenure. The chairman of her department responded that he "frankly did not know," and reiterated his own belief, and that of her faculty colleagues, that plaintiff was indeed entitled to tenure on the basis of her fine record with the Institute. A further request for a statement of reasons appears to have gone unanswered.

In August of 1971, plaintiff filed a complaint with the Department of Health, Education and Welfare. After an investigation, the Regional Civil Rights Director reported that there was reasonable cause to conclude "that Dr. Cohen was discriminated against because of her sex by the Institute when it paid her less than the average salary of similarly situated males," and also cause to believe that she was "terminated in part because of her sex."

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[2] "If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

* * *

"in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation against any one or more of the conspirators."

Plaintiff commenced this action against I.I.T., its former President, its Academic Vice President, and the Chairman of its Board of Trustees in May of 1974. She has alleged three alternative theories of recovery, under § 1983, under § 1985(3), and under the equal protection guarantees contained in the Illinois Constitution.[3] Because of the timing of the alleged discrimination, she has no remedy under either Title VII of the Federal Civil Rights Act of 1964, as amended,[4] or the Illinois Fair Employment Practices Act,[5] although the victim of comparable discrimination occurring today would clearly have a remedy under either of those statutes.

The district court held that Count I of the complaint was insufficient because I.I.T. is not a state institution and the complaint failed to allege state involvement in any of the discriminatory personnel practices; Count II was insufficient both because of the failure to allege state action and also because the alleged determination of policy by I.I.T. and its executives was not a "conspiracy" within the meaning of § 1985(3). Since there was no

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[3] Ill. Const. art. I, §§ 1, 2, 17, 18 (1970).

[4] Title VII of the 1964 Civil Rights Act originally exempted from its coverage

> "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

Pub. L. No. 88-352 § 702, 78 Stat. 255 (1964). *See* 42 U.S.C. § 2000e-1 (1970). This exemption was deleted, effective March 24, 1972, by § 3 of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). *See* 42 U.S.C. § 2000e-1 (Supp. II 1972). Each of the challenged I.I.T. actions took place before this effective date; the 1972 amendments have been held not to apply retroactively. *Weise v. Syracuse University*, Nos. 74-1977, 74-2092, at 4760-4763 (2d Cir., July 14, 1975).

Nor does Cohen have a private cause of action under Exec. Order No. 11246, 3 C.F.R. 339 (1964-1965 Comp.), as amended by Exec. Order No. 11375, 3 C.F.R. 684 (1966-1970 Comp.), which prohibit sex discrimination by federal contractors. *Stevens v. Carey*, 483 F.2d 188, 190 (7th Cir. 1973). Thus, while a "Report of the Investigation" issued by the Department of Health, Education and Welfare in January, 1974, may be admissible in evidence, see Fed.R.Evid. 803(8), it cannot give rise to an independent private cause of action.

[5] The prohibition in the Illinois Fair Employment Practices Act, Ill. Rev. Stat. 1973, ch. 48, §§ 851-867, against sex discrimination did not become effective until August 27, 1971. P.A. 77-1342, § 1. Ill. Rev. Stat. 1973, ch. 48, § 853(a). No challenged actions took place after that date.

independent basis for federal jurisdiction of Count III, it was dismissed without consideration of its sufficiency.[6]

I.

As this case comes to us, we must assume that defendants have discriminated against plaintiff solely because she is a female and, further, that there is no rational basis for a classification of faculty members by sex. If the conduct of the defendants is "state action," they have violated Dr. Cohen's constitutionally protected right to the equal protection of the laws.[7] On the other hand, unless the requisite state involvement has been alleged, the complaint does not state a claim actionable under § 1983. *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172.

To support the proposition that defendants acted under color of state law, plaintiff has made detailed allegations which may be considered in four parts: first, by using the word "Illinois" in its name, I.I.T. has, in effect, held itself out as a state instrumentality;[8] second, I.I.T. has received financial and other support from the state;[9] third,

[6] The district court opinion is reported at 384 F.Supp. 202 (N.D. Ill. 1974).

[7] The Fourteenth Amendment to the United States Constitution provides, in part:

"No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

See Reed v. *Reed*, 404 U.S. 71.

For purposes of decision, we refer only to plaintiff's Federal Constitutional claim of a denial of equal protection. We need not separately consider her due process claim because the state action analysis is the same for that claim as for her equal protection claim.

[8] "(b) the Defendant INSTITUTE deliberately selected an institutional name which includes the name of the State of Illinois and was patterned after the names of Institutes of Technology of other states, which Institutes are formally a part of the university systems of those respective states, thereby, upon information and belief, intending to imply, and implying, that the Defendant INSTITUTE is formally a part of the university system of the State of Illinois and under the control thereof; . . . ."

[9] "(h) graduate students in the programs in counseling psychology and in rehabilitation counseling of the Department of Psychology and Education of the Defendant INSTITUTE intern or participate in practica at State of Illinois mental health centers, rehabilitation centers, and similar State agencies, during which internships and practica the students work in, are paid (directly or indirectly) by, and are under direct control of the respective State agencies;

"(i) the Defendant INSTITUTE, through its Metropolitan Studies Center, conducts seminars in cooperation with, and utilizing speakers provided by, the State of Illinois and its agencies;

• • •

I.I.T. is pervasively regulated by the state;[10] and fourth,

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[9] (Continued)

"(m) the Defendant INSTITUTE administers, subject to the direct control of the State of Illinois, the State Scholarship Program, the State Grant Program, and the State Guaranteed Loan Program;

"(n) the Defendant INSTITUTE solicits the power of eminent domain of the State of Illinois and of various agencies thereof for the acquisition of real property in the environs of said INSTITUTE, said real property to be conveyed to said INSTITUTE, the continued acquisition of such property being dependent on the continued relationship between the State and the INSTITUTE."

[10] "(a) Defendant INSTITUTE is organized and exists under the laws of the State of Illinois, including Chapter 144, Illinois Revised Statutes, §§ 1-17 and §§ 121-135, which sections, *inter alia*, direct the Superintendent of Public Instruction to: (A) examine all so-called privately-operated colleges, junior colleges and universities in the State prior to authorizing a certificate of approval necessary to operate in the State, to ascertain, *inter alia* (i) that each course of instruction to be offered or given is adequate, suitable, and proper, (ii) that the fees to be charged for the courses of instruction are reasonable, (iii) that an adequate physical plant and adequate facilities are provided, and (iv) that the members of the teaching staff are adequately prepared to fulfill their instructional obligations; (B) revoke such certificate for violation of any of the foregoing conditions; (C) make and adopt such rules as, from time to time, he deems necessary; and (D) revoke such certificate of approval for failure to comply with any of the rules adopted by said Superintendent.

* * *

"(c) the Superintendent of Public Instruction of the State of Illinois has, by rule, delegated the accreditation of the curricula, facilities, and faculties of colleges and universities in the State of Illinois to the North Central Association of Colleges and Secondary Schools, which Association does in fact accredit the Defendant INSTITUTE, such accreditation (or lack thereof) being therefore the approval (or disapproval) of the State of Illinois;

"(d) the Defendant INSTITUTE has made admission into numerous academic programs, including that leading to the Master of Science in Teaching degree, contingent on the student's holding a State of Illinois Teacher's Certificate;

"(e) the State of Illinois, through the Illinois State Teacher Certification Board, approves—and by such approval (or lack thereof) controls—at least twelve undergraduate programs at the Defendant INSTITUTE, including programs in psychology in the Department of Psychology and Education for the training and certification of secondary school teachers; and pursuant to regulations of said Board, the Defendant INSTITUTE has established the quantity and content of courses necessary for such certification;

"(f) the State of Illinois, through the Illinois State Teacher Certification Board, approves—and by such approval (or lack thereof) controls—at least eight programs at the Defendant INSTITUTE leading to a degree of Bachelor of Science in Liberal Arts;

"(g) the State of Illinois and the City of Chicago, a municipality thereof, accredit—and by such accreditation (or lack thereof) control—the undergraduate program in the Department of Psychology and Education for the training and certification of secondary school teachers;

* * *

"(j) at least one program in the Department of Psychology and Education of the Defendant INSTITUTE is established, and

it has failed to take affirmative action to prevent I.I.T. from using gender as a criterion for faculty compensation and promotion.[11] The complaint, however, contains no allegation that any State instrumentality has affirmatively supported or expressly approved any discriminatory act or policy, or even had actual knowledge of any such discrimination.

The facts that I.I.T. was chartered by the State and includes the word "Illinois" in its title do not lend any support to the claim that I.I.T. acts under color of state law. Every private corporation, whether profitable or charitable, is chartered by the State; unless the charter contains a special authorization or directive to engage in the challenged conduct, the fact that it is granted by the State is of no significance.[12] The use of the State's name gives rise to an appearance of State involvement in I.I.T.'s activities, but, again, unless the appearance of state sup-

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[10] (Continued)

from time to time is altered, to conform to the requirements of psychological internship in the public schools of Illinois and to meet the requirements of the State of Illinois for certification as a school psychologist;

"(k) programs in the College of Liberal Arts of the Defendant INSTITUTE are established, and from time to time are altered, to conform with the entrance requirements of the University of Illinois Graduate Schools of Medicine, Dentistry, Veterinary Medicine, and Law, and with the regulations of the Illinois State Teachers Certification Board;

"(l) the Defendant INSTITUTE, through its Center for Educational Development, conducts programs for the State of Illinois certified teachers; . . . ."

[11] There is no specific allegation in the complaint relating to the State's failure to act, but plaintiff has argued that the omission of any prohibition against sex discrimination in regulations as detailed as those applicable to I.I.T. is tantamount to implied approval.

In addition to the allegations referred to in the text and the immediately preceding footnotes, plaintiff has alleged that I.I.T. "through its Center for Educational Development, conducts programs for the State of Illinois certified teachers." Para. 3(1). We do not believe this allegation adds any weight to the state action contention.

[12] In *Powe* v. *Miles*, 407 F.2d 73 (2d Cir. 1968), Judge Friendly stated at p. 80:

"To be sure, on a strictly literal basis, whatever Alfred University does is 'under color of' the New York statute incorporating it. But this is also true of every corporation chartered under a special or even a general incorporation statute, and not even those taking the most extreme view of the concept have ever asserted that state action goes that far."

port either facilitates the activity in question,[13] or provides evidence that the institution is, in fact, a State instrumentality,[14] it is of no relevance. Plaintiff has not alleged that either the charter or the name of I.I.T. has any connection with the school's personnel policies.

The State of Illinois provides support for I.I.T. in various ways. The Institute may benefit from the State's eminent domain powers;[15] its students are allowed to use the facilities of various state agencies in certain study programs; its students receive financial support in the form of loan guarantees and scholarships; and, under the State Grant Program, funds are provided directly to the school.[16] At most, however, the funds contributed by the

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[13] Relying on Mr. Justice Brennan's separate opinion in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 211-213, plaintiff argues that a mere appearance of state involvement even without any actual substance, would satisfy § 1983's "under color of" requirement. This is not a fair reading of Mr. Justice Brennan's opinion. As he stated:

> "To understand how that language applies to private persons, it is helpful to consider its application to state officials. In other legal usage, the word 'color,' as in 'color of authority,' 'color of law,' 'color of office,' 'color of title,' and 'colorable,' suggests a kind of holding out and means 'appearance, semblance, or simulacrum,' but not necessarily the reality. See H. Black, Law Dictionary 331-332 (rev. 4th ed. 1968). However, as the word appears in § 1983, it covers both actions actually authorized by a State . . . and misuse of state authority in ways not intended by the State. . . . Thus, a public official acting by virtue of his official capacity always acts under color of a state statute or other law, whether or not he overtly relies on that authority to support his action, and whether or not that action violates state law. A private person acts 'under color of' a state statute or other law when he, like the official, in some way acts consciously pursuant to some law that gives him aid, comfort, or incentive, . . . or when he acts in conjunction with a state official. . . ."

[14] The reference to the name of the New York State College of Ceramics in *Powe* v. *Miles*, 407 F.2d at 82, was to evidence that the college was in fact a state institution; Judge Friendly did not suggest that a mere appearance of authorization would provide a substitute for the actual fact.

[15] *See Grafton* v. *Brooklyn Law School*, 478 F.2d 1137, 1141-1142 (2d Cir. 1973); *Furomoto* v. *Lyman*, 362 F.Supp. 1267, 1278-1279. *But see Racklin* v. *University of Pennsylvania*, 386 F.Supp. 992, 1001 (E.D. Pa., 1974). Of course, state action might well be found to exist if I.I.T. was actually empowered by the state to exercise the power of eminent domain, rather than merely receiving the benefits of the state's use of that power. *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352-353.

[16] Ill. Rev. Stat. 1973, ch. 144, § 1333.

State represent only a small fraction of the cost of educating the students for whom the grants are paid.[17]

Two different conclusions may be drawn from the allegations relating to the State's support of I.I.T. First, it is plain that the school is not so heavily dependent on the State as to be considered the equivalent of a public university for all purposes and in all its activities.[18] It would dramatically enlarge the state action concept to conclude that these facts are sufficient to require a complete surrender of a university's private character.[19] On the other hand, it is equally clear that the State's support of I.I.T. is sufficiently significant to require a finding of state action if that support has furthered the specific policies or conduct under attack. Again, however, there is no allegation in the complaint that the various forms of assistance given to I.I.T., or to its students, by the State, have had any impact whatsoever on the ability of Dr. Cohen, or any other member of her sex, to be treated impartially by the administration of the Institute. The State has lent significant support to I.I.T.; it is not, how-

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[17] The State Grant Program provides for the payment of grants for Illinois residents enrolled in I.I.T. to a maximum extent of $100 or $200 per student.

[18] In contrast, the financial contributions by the state to the University of Louisville ("substantial financial support"), *Brown* v. *Strickler*, 422 F.2d 1000, 1001 (6th Cir. 1970); Temple University (up to 54.2% of the school's operating income), *Isaacs* v. *Board of Trustees of Temple University*, 385 F.Supp. 473, 479 (E.D. Pa. 1974); and the University of Pennsylvania (25% of the University's "hard core" budget), *Racklin* v. *University of Pennsylvania*, *supra* n. 15, at 996-998, where sufficient state involvement was found, were significantly greater than that which could possibly be proven here. Nor is the extent of the state contributions sufficiently in doubt so as to require a reversal of the dismissal of the complaint, as was the case in *Weise* v. *Syracuse University*, Nos. 74-1977, 74-2092, at 4754 (2d Cir., July 14, 1975), and *Braden* v. *University of Pittsburgh*, 477 F.2d 1, 6 (3rd Cir. 1973).

[19] Dr. Cohen correctly notes that in *Grafton* v. *Brooklyn Law School*, *supra* n. 15, Judge Friendly stated that the $400 per student contributed by the State of New York to the school might be sufficient to demonstrate sufficient state participation if racial discrimination were the challeged private activity. 478 F.2d at 1142. We have no occasion to rule on the "facts and circumstances" surrounding the state involvement calculus in such a case. We simply conclude here that the amounts allegedly paid to I.I.T. by the State of Illinois do not demonstrate, in Judge Friendly's words, that "the wholly state supported activity is so dominant that the private activity could be deemed to have been swallowed up." *Powe* v. *Miles*, *supra* n. 12 at 82.

ever, alleged to have lent any support to any act of discrimination.[20]

The same analysis is applicable to the allegations describing the State's comprehensive regulation of the Institute. The regulation encompasses a wide variety of matters, from physical plant to course content and faculty qualifications. It is settled, however, that the mere existence of detailed regulation of a private entity does not make every act, or even every regulated act, of the private firm, the action of the State.[21] Unless it is alleged that the regulatory agency has encouraged the practice in question, or at least given its affirmative approval to the practice, the fact that a business or an institution is subject to regulation is not of decisive importance.[22]

Plaintiff's extensive allegations describing the State's many controls over I.I.T. need not be separately discussed; for in none is there any suggestion that the State of Illinois, or any agent or agency of the State, has affirmatively encouraged or approved faculty employment discrimination on the basis of gender.[23]

Finally, we are not persuaded that the omission of any affirmative prohibition against sex discrimination, even against the background of detailed State regulation of

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[20] *Cf. Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756, 761 (7th Cir. 1973):

> "There is no claim that the state has sought to influence hospital policy respecting abortions, either by direct regulation or by discriminatory application of its powers or its benefits. Insofar as action of the State of Wisconsin or its agents is disclosed by the record, the State has exercised no influence whatsoever on the decision of the defendants which plaintiffs challenge in this litigation."

[21] *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 176-177; *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 350.

[22] *Compare Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, which the Court recently described as a situation "where the regulatory agency had affirmatively approved the practice of the regulated entity after full investigation, . . ." *Moose Lodge No. 107*, *supra*, 407 U.S. at 175-176, n. 3.

[23] The relevant allegations are quoted in full in notes 9, 10 and 11, *supra*. The three aspects of the State regulation that most directly connect the State of Illinois with the employment-tenure policies of I.I.T. are these. First, plaintiff notes that the Superintendent of Public Instruction is required to examine I.I.T., prior to the issuance of a

the Institute, is tantamount to express State approval of the objectionable policy. The holding of the Supreme Court in *Moose Lodge No. 107* v. *Irvis, supra,* requires us to reject such an argument. For it is abundantly clear that the State of Pennsylvania had ample power to revoke the liquor license of Lodge No. 107, and further that the State could not constitutionally endorse the Lodge's discriminatory practices. If a State's mere failure to prohibit could be equated with express approval, the *Moose Lodge* case would have been decided differently.[24]

The facts set forth in the complaint do not support the conclusion that defendants acted under color of state law

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[23] (Continued)

certificate of approval, to ascertain "That the members of the teaching staff are adequately prepared to fulfill their instructional obligations." Ill. Rev. Stat. 1973, ch. 144, § 124(4). To carry out the purposes of the act requiring such an ascertainment, the Superintendent is empowered to adopt rules and regulations. *Id.*, § 134.

Second, plaintiff alleges that the Superintendent, by rule, has delegated the accreditation of curricula, facilities, and faculties of Illinois colleges and universities to the North Central Association of Colleges and Secondary Schools, which has in fact granted accreditation to I.I.T.

Finally, plaintiff notes that, as a precondition to its participation in the State Grant Program discussed above, I.I.T. must "possess and maintain an open policy with respect to race, creed and color as to admission of students, appointment of faculty and employment of staff." Ill.Rev.Stats. 1973, ch. 144, § 1333(3).

[24] We have not overlooked plaintiff's argument that I.I.T., in providing higher educational services, is engaged in a traditionally public function. As plaintiff recognizes, this argument has been routinely rejected by the courts in private college and university cases. *See Blackburn* v. *Fisk University,* 443 F.2d 121, 124; *Browns* v. *Mitchell,* 409 F.2d 593, 596 (10th Cir. 1969); *Powe* v. *Miles, supra* n. 12, at 80; *Pendrell* v. *Chatham College,* 370 F.Supp. 494, 497 (W.D.Pa. 1974); *Furomoto* v. *Lyman, supra,* n. 15, at 1277; *Bright* v. *Isenbarger,* 314 F.Supp. 1382, 1393 (N.D. Ind. 1970), *aff'd* 445 F.2d 412 (7th Cir. 1971); *Grossner* v. *Trustees of Columbia University,* 287 F.Supp. 535, 549 (S.D.N.Y. 1968); *Contra, Belk* v. *Chancellor of Washington University,* 336 F.Supp. 45, 49 (E.D.Mo. 1970).

Dr. Cohen argues, however, that the State of Illinois has declared higher education to be a public function in the preamble of the Educational Facilities Authority Act adopted in 1969, wherein it is stated that "it is essential that this and future generations of youth be given the fullest opportunity to learn and to develop their intellectual and mental capacities and skills. . . ." We disagree; as Judge Friendly stated in response to a similar argument concerning Alfred University in *Powe* v. *Miles, supra,* at 80:

in their discrimination against plaintiff. Nevertheless, plaintiff argues that since she has alleged the necessary ultimate conclusion in the language of the statute, the complaint should not be dismissed before she has completed discovery which may reveal some nexus between the State of Illinois and defendants' wrongful conduct. Her argument is supported by the admonition in *Conley* v. *Gibson*, 355 U.S. 41, 45-46, that dismissal is inappropriate unless it is clear beyond doubt that plaintiff can prove no set of facts in support of his claim that will entitle him to relief, and also by *Weise* v. *Syracuse University*, ... F.2d ....., No. 74-1977, No. 74-2092 (2d Cir. July 14, 1975), a faculty sex discrimination case in which the Second Circuit ordered a trial on the state action issue.

We agree that plaintiff is entitled to the fullest opportunity to adduce evidence in support of her claim. But she is not entitled to a trial, or even to discovery, merely to find out whether or not there may be a factual basis for a claim which she has not made. Her complaint omits any allegation of state support or approval of the defendants' discriminatory conduct, and the detailed facts set forth in the complaint, even if wholly true and liberally construed in her favor, do not warrant the conclusion that I.I.T. is a public university. It is clear beyond doubt that the claim which she has alleged does not entitle her to relief.

In the *Weise* case, the plaintiff had alleged that the University received so much public aid, both in the form of grants and in payment for services provided under

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[24] (Continued)

"Education has never been a state monopoly in this country, even at the primary or secondary levels, and New York's entry into higher education on a significant scale came more than a century after Alfred's establishment."

Illinois' recent declaration of the importance of higher education can scarcely convert I.I.T.'s activities into "powers traditionally exclusively reserved to the State." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. at 352.

There is, of course, no suggestion that I.I.T. has replaced a former public institution which was closed in order to enable its private successor to continue a forbidden discriminatory policy. *Cf. Griffin* v. *County School Board of Prince Edward County*, 377 U.S. 218.

contract, that Syracuse University was dependent on such support for its continued operation. There are no comparable allegations in Dr. Cohen's complaint.[25] We need not decide whether we would have ordered a trial of the *Weise* complaint, but we are satisfied that Count I of the pleading before us does not state a claim for relief under 42 U.S.C. § 1983.

II.

Count II of the complaint alleges that the individual defendants, perhaps in concert with other unknown individuals, conspired to have I.I.T. adopt policies or practices having the effect of discriminating against women holding faculty appointments from I.I.T., and thereby to deprive them of their Fourteenth Amendment right to the equal protection of the laws. Count II is predicated on § 1985(3), which proscribes private conspiracies to deprive a person of a constitutionally protected right.

Quite properly, Count II omits any allegation that the individual defendants acted under color of state law. For there is no statutory requirement of State participation or support for the conduct of the individual conspirators proscribed by § 1985(3).[26] There is, however, a requirement that the conspiracy deprive the plaintiff of a federally protected right. That requirement would be satisfied if I.I.T. were a State university,[27] or if the constitutional

[25] It should also be noted that in the *Weise* case the affidavit submitted by the defendants indicated that State funds constituted only 3.6% of the school's annual budget. The Second Circuit opinion indicated that if no more financial support was involved, there would be little question about the result. However, the defendants' affidavit had been controverted by the plaintiff sufficiently to raise an issue of fact requiring trial. Moreover, the *Weise* complaint alleged that federal funds had been supplied on condition that the school adopt an affirmative action hiring program designed to increase minority and female faculty representation. There was thus a greater likelihood that an evidentiary hearing would disclose state activity in the hiring area directly connected with the activity in dispute. There are no comparable allegations in the complaint before us.

[26] *Griffin* v. *Breckenridge*, 403 U.S. 88; *Dombrowski* v. *Dowling*, 459 F.2d 190, 194 (7th Cir. 1972).

[27] It is clear that a private conspiracy to cause the plaintiff to receive unequal treatment from the State, or from a State agency, would violate § 1985(3). *Cf. United States* v. *Guest*, 383 U.S. 745. As we have previously pointed out, it is a fair distillation of the four opinions filed in *Guest* to state

right of the plaintiff at stake were one that is entitled to protection against anyone, rather than merely protection from impairment by a state.[28]

The constitutional rights which were vindicated by the Supreme Court's decision in *Griffin* v. *Breckenridge*, 403 U.S. 88, were not mere prohibitions against objectionable state action. That case held that a private conspiracy to deprive the plaintiffs of their Thirteenth Amendment rights, or their right of interstate travel, was actionable under § 1985(3). Neither of those constitutional rights is merely a limitation on state power.

Thus, the Court reminded us that the Thirteenth Amendment "'is not a mere prohibition of State laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States.' *Civil Rights Cases*, 109 U.S. 3, 20. See also *id.*, at 23; *Clyatt* v. *United States*, 197 U.S. 207, 216, 218; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. at 437-440." 403 U.S. at 105. And the Court also emphasized "that the right of interstate travel is . . . assertable against private as well as governmental interference. *Shapiro* v. *Thompson*, 394 U.S. 618, 629-631; *id.*, at 642-644 (concurring opinion); *United States* v. *Guest*, 383 U.S. 745, 757-760 and n. 17; . . . ." 403 U.S. at 105-106.

On the other hand, it is equally well settled that the Fourteenth Amendment is not a protection against purely private interference and may be violated only by the action of a state. *See, e.g., Shelley* v. *Kraemer*, 334 U.S. 1, 13.[29] For that reason, we have held that a private con-

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[27] (Continued)

"that, although there was disagreement within the Court on the question whether defendants' private conduct would have been proscribed if there had been no cooperative action by state officers, all members of the Court recognized the need for state involvement in the provision of facilities to which the victims of the conspiracy were denied equal access. In short, the right secured by the Equal Protection clause of the Fourteenth Amendment is a right to protection against unequal treatment by a state." *Dombrowski* v. *Dowling*, 459 F.2d at 196. (Footnote omitted.)

[28] As Judge Craven pointed out in *Bellamy* v. *Mason's Stores, Inc.* (*Richmond*), 508 F.2d 504, 507, ". . . there are no Equal Protection Clause rights against wholly private action."

[29] "Since the decision of this Court in the *Civil Rights Cases*, 109 U.S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.[12]" (Footnote omitted.)

spiracy to make a completely irrational discrimination between criminal lawyers and other prospective tenants of office space was not covered by § 1985(3). *Dombrowski* v. *Dowling*, 459 F.2d 190 (7th Cir. 1972). The rationale of *Dombrowski* is controlling here.

We recognize, as plaintiff argues, that there is language in *Griffin* which may indicate that the statute will be construed to cover any invidiously discriminatory private conspiracy,[30] and that other circuits, without careful consideration of the issue, have stated that state action is never an element of a § 1985(3) claim.[31] We are satisfied, however, that the distinction between the two kinds of state involvement that may be relevant in civil rights litigation—first, whether the defendant has acted under color of state law, and, second, whether plaintiff's federal

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[30] Plaintiff relies primarily on a passage in *Griffin* v. *Breckenridge*, *supra*, at 102, where the Court stated:

> "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger, quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (Footnote omitted.)

In note 9 the Court said:

> "We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us. Cf. Cong. Globe, 42d Cong., 1st Sess., 567 (1871) (remarks of Sen. Edmunds)."

Plaintiff would read this language from *Griffin* as establishing that any private conspiracy to deny a person equal treatment because of some "class-based invidiously discriminatory animus" is actionable under § 1985(3). This interpretation overlooks, however, the fact that the Court, in this passage, was concerned solely with the motivation of the conspirators and not with the right of the complainant that was the subject of the infringement. In the next sentence after n. 9, the Court stated:

> "The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all."

[31] In many cases, *Griffin* is cited for the general proposition that state action is never necessary in a § 1985(3) action. *See, e.g., Weise* v. *Syracuse University*, Nos. 74-1977, 74-2092, at 4756-4757 (2d Cir., July 14, 1975); *Richardson* v. *Miller*, 446 F.2d 1247, 1249 (3rd Cir. 1971).

right is merely assertable against the State[32]—requires consideration of the state action issue in cases bottomed on an alleged violation of the Fourteenth Amendment.

We have no doubt that discrimination which is invidious because of racial motivation would be covered since the protection of the Thirteenth Amendment is not merely against state action. But since the Court in *Griffin* so carefully refrained from holding that any discrimination which would be actionable if practiced by the State is for that reason also actionable under § 1985(3), we remain convinced that our reasoning in *Dombrowski* is a correct explanation of why the statute does not broadly "apply to all tortious, conspiratorial interferences with the right of others." 403 U.S. at 101.[33]

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[32] In *Dombrowski* we commented on this distinction at some length, stating, in part:

> "Although the point is sometimes obscured or overlooked, § 1983 contains two quite distinct 'state involvement' requirements. The first is clearly stated in the statute: the defendants must have acted 'under color of' state law.[7] The second inheres in the nature of plaintiff's protected rights: he may not be deprived 'of any rights, privileges, or immunities secured by the Constitution and laws.'[8] His Fourteenth Amendment right to protection against discrimination extends only to cases in which state action is involved.[9]" 459 F.2d at 194.

The footnotes quoting extensively from Mr. Justice Brennan's opinion in *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 188-190, are omitted.

[33] We have not been faced with the question whether the *Dombrowski* rationale would apply to a right protected by the First Amendment which in terms is only a protection against State action, but which is often accorded special deference. The Fourth Circuit has, however, held insufficient allegations that a private conspiracy had deprived a person of his rights of association. *Bellamy* v. *Mason's Stores, Inc.*, 508 F.2d 504, 506-507 (1974). There is authority to the contrary. In *Action* v. *Gannon*, 450 F.2d 1227 (8th Cir. 1971) (en banc), the court held that a private conspiracy to prevent a person from exercising his First Amendment rights is actionable under § 1985(3). 450 F.2d at 1235-1237. Similarly, in *Richardson* v. *Miller*, 446 F.2d 1247 (3rd Cir. 1971), a district court dismissal of a § 1985(3) complaint was reversed; the court held the plaintiff had stated a cause of action when he alleged he had been fired from his employment because of his criticism of his employer's racially discriminatory hiring practices.

Most recently, a Fifth Circuit panel has applied § 1985(3) to a conspiracy claim alleging that defendants had conspired to take plaintiff's life and to dismiss him from his job because of his outspoken support of environmental issues. *Westberry* v. *Gilman Paper Co.*, 507 F.2d 206 (5th Cir. 1975). The panel opinion in *Westberry* has been withdrawn, however, and, thus, has no precedential value.

Because of this conclusion as to the scope of the rights protected by § 1985(3), we do not reach the issue whether a determination of policy by an institute and its executives can be a "conspiracy" within the meaning of this section.

III.

Since we have held that plaintiff's federal claims were properly dismissed, it was also proper for the district court to refuse to exercise pendent jurisdiction over the State claim.

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 26, 1975

BEFORE

Hon. THOMAS F. MCALLISTER, *Senior Circuit Judge**
Hon. LUTHER M. SWYGERT, *Circuit Judge*
Hon. JOHN PAUL STEVENS, *Circuit Judge*

No. 74-1930

HELEN A. COHEN,

Plaintiff-Appellant,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, JAMES J. BROPHY, JOHN T. RETTALIATA, and MAYNARD P. VENEMA,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division—
No. 74 C 1374
THOMAS R. MCMILLEN, *Judge*

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* Senior Circuit Judge Thomas F. McAllister of the United States Court of Appeals for the Sixth Circuit is sitting by designation.

ORDER

The quality of the petition for rehearing merits a brief additional comment.

Norwood v. Harrison, 413 U.S. 455, did not involve the question whether action taken by a school, or by school officials, was under color of state law. That case involved a direct challenge to a state program under which text books were provided to students at state expense. In the case before us the plaintiff has not challenged any of the state programs which provide support to I.I.T. or to its students. *Cf. Lucas v. Wisconsin Electric Power Company*, 466 F.2d 638, 645-647 (7th Cir. 1972).

The analysis in Part II of our opinion assumed for the purpose of decision that Congress has ample power to enact a statute having the coverage urged by petitioner but concluded that § 1985(3) is not such a statute. As explained in footnote 33 of the opinion, the cases cited at page 8 of the petition for rehearing [*Westberry v. Gilman Paper Co.*, 507 F.2d 206 (5 Cir. 1975); *Action v. Gannon*, 450 F.2d 1227 (8 Cir. 1971); *Commonwealth v. Local Union No. 542*, 347 F. Supp. 268, 287-297 (E.D. Pa. 1972)] do not conflict with our holding.

No member of the panel and no judge in regular active service having requested that a vote be taken on the suggestion for an *en banc* rehearing, and the panel having voted to deny a rehearing, the petition for rehearing is denied.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 74 C 1374

HELEN A. COHEN,

Plaintiff,

v.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, et al.,

Defendants.

DECISION

Defendants have filed a motion to dismiss the complaint for failure to state a claim. The complaint alleges in substance that the plaintiff was deprived of tenure and pay as an associate professor because of her sex, in violation of her rights under the Fourteenth Amendment to the Constitution of the United States. The complaint is in three counts, Count I for damages and other relief under 42 U.S.C. § 1983, Count II for damages and other relief under 42 U.S.C. § 1985(3), and Count III as a pendent claim for damages and other relief under the Illinois Constitution of 1970. We find and conclude that the defendants' motion should be granted.

The complaint does not allege the equivalent of state action within the meaning of § 1983, as applied in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961). Plaintiff alleges that the following circumstances in effect make I.I.T. the *alter ego* of the State of Illinois (par. 8 of the Complaint):

> (a) I.I.T. is organized under an Illinois statute which directs the Superintendent of Public Instruction to issue and revoke its certificate to operate in the State.

No doubt this same regulatory duty is required of the Superintendent with respect to all private educational institutions in Illinois, but it does not follow from this that such institutions are thereafter engaging in state actions in everything which they do.

Furthermore, in this particular case, the several requirements allegedly imposed by the Superintendent of Public Instruction as a condition for a certificate do not concern the hiring or tenure of teachers. Therefore it cannot be said that the State of Illinois controls or is responsible for the actions of I.I.T. toward the plaintiff within the meaning of *Burton v. Wilmington Parking Authority*, supra.

(b) By its name, the Institute implies that it is part of the University system of the State of Illinois. This alleged implication certainly does not make I.I.T. an agency of the State.

(c) The Superintendent of Public Instruction has delegated the accreditation of curricula and faculties to the North Central Association of Colleges and Secondary Schools, which thereupon accredits I.I.T. This allegation adds nothing to support subparagraph (a) above, except possibly to raise the question of the lack of a necessary party.

(d) I.I.T. (not the State of Illinois) requires a State of Illinois Teacher's Certificate in order for a student to participate in certain of its academic programs.

(e) The State of Illinois "controls" certain undergraduate programs at I.I.T., including some in plaintiff's department, as a condition for training and certifying secondary school teachers.

(f) The State of Illinois "controls" certain other programs at I.I.T. which lead to a degree of Bachelor of Science.

(g) The State of Illinois (and the City of Chicago) control certain undergraduate programs for training and certification of secondary school teachers.

(h) Graduate students at I.I.T. participate in mental health internships with various state agencies of the State of Illinois as part of their academic training.

(i) I.I.T. conducts seminars in cooperation with the State of Illinois (although this is not alleged to involve the plaintiff's department).

(j) At least one program at I.I.T. is established to conform to the requirements of psychological internship in the public schools of Illinois in order to meet the State requirements for certification as a school psychologist.

(k) Certain courses at I.I.T. conform to the entrance requirements of some of the graduate schools of the University of Illinois.

(l) I.I.T. conducts programs for the State of Illinois' certified teachers.

(m) I.I.T. administers the State Scholarship Program and other State financial aids to students.

(n) I.I.T. "solicits" the power of eminent domain for the acquisition of real property.

We assume that plaintiff could prove all of these allegations. It is obvious from the foregoing summarization that I.I.T. cooperates with the State of Illinois and is dependent upon its approval in many respects. This does not make it a State institution or agency with respect to the tenure and salary of its academic staff, however. In fact, plaintiff does not allege State involvement in any of the personnel practices complained of. In *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), the court said at p. 173:

> The Court has never held . . . that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever. Since state-furnished services included such necessities of life as electricity, water, and police and fire protection, such a holding would

> utterly emasculate the distinction between private as distinguished from state conduct set forth in The Civil Rights Cases, and adhered to in subsequent decisions. Our holdings indicate that where the impetus for the discrimination is private, the State must have "significantly involved itself with invidious discriminations," *Reitman v. Mulkey*, 387 U.S. 369, 380 (1967), in order for the discriminatory action to fall within the ambit of the constitutional prohibition.

The Seventh Circuit has taken an equally restrictive view of this jurisdictional limit of § 1983 in *Doe v. Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973).

A case similar to the one at bar is *Furumoto et al. v. Lyman et al.*, 362 F.Supp. 1267 (N.D. Calif., 1973). In dismissing the § 1983 complaint against the president of Stanford University and others, the court summarized its reasons at pages 1278-9, as follows:

> A finding of general state action here would require more than an accumulation of the state benefits or regulations cited by plaintiffs. These factors do not establish state control or the inherently governmental nature of the university. Plaintiffs have not demonstrated that Stanford is controlled by the State of California or that Stanford does not have a substantial sphere of private, independent authority and initiative. The State's grant to Stanford of corporate powers and privileges is not evidence of State control. The State has thus merely given Stanford substantially the same corporate powers and privileges given to any corporation formed under its laws . . . . Nor can plaintiffs find support in the power granted Stanford by legislation to charge tuition to California residents. California Educational Code § 30021. The tax exemptions granted to Stanford extend also to many other nonprofitmaking institutions . . . . . These exemptions and the power of eminent domain are indeed benefits accorded Stanford by the State, but the legislature is thereby promoting what it views to be the public interest in the existence of private

educational institutions. Even if the State directly subsidized the University, this financial aid would not necessitate a finding of State control.

With the corporate defendant out of the case, the allegations of Count I against the individual defendants amount to nothing more than that they "knew or should of known" of certain allegedly discriminatory acts against the plaintiff. The individual defendants were officers or directors of the corporate defendant but are not alleged to have controlled it or to have personally committed acts of discrimination, except in conclusory and vague terms (pars. 13, 14 and 15 of the complaint). Allegations of this sort are not deemed to be true for the purpose of this motion, and the plaintiff must point her finger more directly toward the individuals responsible for the acts of alleged discrimination before she can require them to defend. Cf. *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971).

Count II must fall for much the same reason. Under the controlling decision of *Dombrowski v. Dowling*, 459 F.2d 190 (7th Cir. 1972) the court held that § 1985(3) requires (a) "state action" and (b) a conspiracy by two or more separate individuals, as distinguished from the "collective judgment of two or more executives of the same firm" (459 F.2d at p. 196). The allegations of Count II fail to satisfy both of these requirements. Not only is the element of state involvement lacking, as discussed above under Count I, but also the challenged conduct is essentially the act of a single entity.

Count III, being pendent, must fall with the other two. *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966).

We are well aware of the general policy of the Federal courts not to dismiss a complaint if the plaintiff could possibly prove some set of facts under the pleadings which would entitle her to relief. *Burns v. Paddock*, 503 F.2d 18, (7th Cir., 1974). However, she must first allege these facts or at least a foundation for proving them and not rely upon the Court or the defendants to speculate concerning what she might be able to prove. She has a right to try to allege a cause of action by amendment,

but the facts and conclusions which she has chosen as a basis for her present complaint are insufficient to put any of the defendants to a trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the motion of the defendants to dismiss the complaint is granted.

ENTER:

/s/ THOMAS R. MCMILLEN

Judge, U.S. District Court

DATED: October 29, 1974

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1154

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, **JAMES J. BROPHY, JOHN T. RETTALIATA**, and **MAYNARD P. VENEMA,**

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

Regarding Certiorari Policy:

Should this Court grant certiorari on the issue whether Petitioner's complaint states a cause of action under 42 U.S.C. §§ 1983 and 1985(3) when the decision appealed from is in accord with the well-established and consistent holdings of this Court?

Regarding the Merits:

1. Did the Court of Appeals for the Seventh Circuit err in affirming the dismissal of Count I of Petitioner's complaint on the grounds that the allegations contained in the complaint were insufficient to support a finding of "state action" for purposes of § 42 U.S.C. § 1983?

2. Did the Court of Appeals for the Seventh Circuit err in affirming the dismissal of Count II of Petitioner's complaint regarding the claim under 42 U.S.C. § 1985(3) on the grounds that the complaint failed to allege the deprivation of any federally protected right?

STATEMENT OF THE CASE

This case comes before this Court on a Petition for a Writ of Certiorari (hereinafter "Petition") from the decision of the Court of Appeals for the Seventh Circuit which affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division dismissing the complaint for failure to state a claim under 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3).

The decisions of the District Court and the Court of Appeals are set forth at length in the Appendix to the Petition and shall be hereinafter cited by reference to such Appendix as "Petition App., pp. 1a-24a."

Petitioner, Dr. Helen A. Cohen, a female Assistant Professor (under contract of employment but without tenure) in the Department of Psychology and Education at the Illinois Institute of Technology (hereinafter "IIT"), was advised in March of 1971 that she would not be offered a tenured appointment as Associate Professor at IIT. Unwilling to remain in a non-tenured position, the Petitioner resigned.

Petitioner brought this action under 42 U.S.C. §§ 1983 and 1985(3), and under the Illinois Constitution through pendent jurisdiction. Her complaint alleged that IIT, a private university, and certain of its corporate officers, were acting under color of state law within the meaning of 42 U.S.C. § 1983, and were participating in a conspiracy prohibited by § 1985(3), in discriminating against her be-

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cause of her sex by not granting her tenure and by paying her less than the average salary of similarly situated males.

On motion of Respondents under Rule 12 of the Federal Rules of Civil Procedure, the District Court dismissed the complaint. The court held that Count I of the complaint, alleging a violation of § 1983, was insufficient because the complaint failed to allege state involvement in any of the discriminatory personnel practices of IIT (Petition App., p.21a). Count II, alleging a violation of § 1985(3), was dismissed for failure to allege state action and, in addition, because the policy determination by IIT and its executives did not constitute a "conspiracy by two or more separate individuals as distinguished from the 'collective judgment of two or more executives of the same firm' " (Petition App., p. 23a). The pendent jurisdiction count was accordingly dismissed.

The Court of Appeals unanimously affirmed the District Court, holding that the mere existence of detailed regulation of and financial support to a private entity does not make every act of the private entity an action of the state entitled to protection under § 1983 unless the state has approved of, participated in or lent support to the alleged acts of discrimination (Petition App., pp. 8a-10a). With respect to the § 1985(3) count, the Court of Appeals held that while state participation in or support for the conduct of the individual conspirators need not be alleged to state a cause of action under § 1985(3), the conspiracy must, nevertheless, deprive the plaintiff of a federally protected right. The Court held that if the rights sought to be vindicated are Fourteenth Amendment rights, they must be rights protected from impairment by a state (Petition App., pp. 12a-13a). The District Court's second ground for dismissal of the § 1985(3) count was not reached by the Court of Appeals in its decision affirming the ruling of the District Court (Petition App., p. 16a).

Petitioner subsequently filed with the Court of Appeals a petition for rehearing and a suggestion for hearing *en banc*, both of which were denied (Petition App., pp. 17a-18a).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

This Court should not grant the Petition because the decision of the court below is in accord with well-established precedent of this Court and is not in conflict with any other decision of this Court.

1.

The Decision Below is in Accord With The Decisions of This Court on What Constitutes State Action Under 42 U.S.C. § 1983

Petitioner has suggested that there exists a majority view (following the decisions of this Court) and a minority view (ascribed to the court below) defining the proper test to be used in determining what constitutes "state action" under 42 U.S.C. § 1983. She suggests that the giving of "significant" aid by the state to a private institution is sufficient state action, as a matter of law, to invoke § 1983. She denies that a nexus must exist between the state support and the challenged discriminatory policies (Petition, p. 10), and charges that this additional requirement is a test followed only by a minority of courts.

Respondents urge that the alleged conflicts between these "tests" are illusory, and that the decision of the Court of Appeals below follows the uniform holdings of this Court which have consistently required considerably greater involvement of the state in the discriminatory practices of a private institution than the Petitioner has alleged in her complaint.

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Petitioner would have this Court apply the test for "state action" described in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). Respondents join in this request. In *Burton*, this Court found "state action" to exist when the facts showed sufficient "state participation and *involvement in discriminatory action* which it was the design of the Fourteenth Amendment to condemn." (italics supplied) 365 U.S. at 724. The Court specifically held as follows:

> "The State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." 365 U.S. at 725.

In *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972), also cited by Petitioner, this Court restated the principle of *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967) that the state must have "significantly involved itself with invidious discriminations" of the private institution in order for the discriminatory action to fall within the ambit of constitutional prohibition. This Court in *Moose Lodge* found that the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board "does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge to make the latter 'state action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." 407 U.S. at 177.

More recently, in *Jackson* v. *Metropolitan Edison Company*, 419 U.S. 345, 351 (1974), this Court required that there be "a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."

Despite the clear and consistently imposed requirement of state involvement in the alleged discrimination, either actively direct or passively by way of a symbiotic relationship, Petitioner insists no nexus is required for a finding of state action. This position is without support in the decisions of this Court.

Petitioner has attempted to distinguish *Burton* from *Moose Lodge* and *Jackson* on the grounds that the latter involve state regulation, not support. In doing so, Petitioner appears to ignore that a substantial portion of her complaint consists of allegations of state regulation, not support. In any event, these cases do not establish two distinct lines of precedent, one finding "state action" based on state financial aid and the other not. The only differences among these cases lie in the applicable facts. This Court has held repeatedly that: "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722 (1961); *Reitman* v. *Mulkey,* 387 U.S. 369, 378 (1967); *Moose Lodge No. 107* v. *Irvis,* 407 U.S. 163, 172 (1972). The multitudinous factors of state involvement in the regulated utility industry were carefully set forth and analyzed in great detail in *Jackson* v. *Metropolitan Edison Company,* 419 U.S. 345, 349-59 (1974).

Nevertheless, contrary to the clear instructions of this Court, Petitioner here seeks to avoid the careful consideration of the factual allegations, and demands the promulgation of a new rule of law: whenever "significant" government aid is provided an employer, its actions are, *ipso facto,* state actions.

The court below performed no idle exercise in carefully analyzing each of the allegations of state involvement set

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forth in the complaint before determining that the allegations failed to establish any connection between the state support or state regulation and the challenged conduct of the Respondents. Four judges below considered each of the Petitioner's allegations concerning state action. Each of the four concluded that there was insufficient basis for a finding of state action.

Petitioner cites *Norwood* v. *Harrison*, 413 U.S. 455 (1973), for the proposition that the furnishing of state aid to private schools alone is sufficient to convert the private school's conduct into "state action." *Norwood*, however, involved an action to enjoin the enforcement of a state's textbook lending program. The question was not raised whether the state's own program of distribution constituted "state action," but only whether the distribution could properly be made to certain private as well as public schools.

Petitioner is asking this Court to abandon a well-established rule of law recognized by this Court on numerous occasions, and to substitute therefor a far less certain test of "state action". Petitioner would ask the Court to establish, as an automatic rule, that "significant" aid to a private employer by the state makes that employer a public employer, an arm of the state.

But what is "significant"? What shall be the legal standard? Is "significant" to mean "much" or "lots of" or "more than a mere scintilla of" or "that which is not insignificant?" Why should this Court adopt an undefined standard when a clear one exists which requires either state involvement in the challenged activity or a symbiotic relationship between the state and the private establishment. Under the current standard, the state must have so far "insinuated itself into a position of interdependence" with the private enterprise that it is a "joint participant" in the enterprise

(*Burton, supra,* 365 U.S. at 725); or the state must be "sufficiently connected with" the challenged activity to make the conduct of the private party "attributable to the State" (*Jackson, supra,* 419 U.S. at 358-9); or the state must have "significantly involved itself with invidious discriminations" (*Reitman, supra,* 387 U.S. at 380); or the state must be sufficiently implicated in the discriminatory policies of the private institution as to realistically be a "partner or even a joint venturer" in the private enterprise (*Moose Lodge, supra,* 407 U.S. at 177). The standard described by these cases is far more circumscribed than that which Petitioner would have this Court now adopt.

2.

The Decision Below is in Accord With Decisions of this Court in Finding that Petitioner Failed to Allege a Claim Upon Which Relief May Be Granted Under 42 U.S.C. § 1985(3)

Petitioner has argued that a claim for relief under 42 U.S.C. § 1985(3), alleging a conspiracy to deprive her of her civil rights because of her sex, does not require an allegation of "state action" (Petition, pp. 12-16).

This Court, in *Griffin* v. *Breckenridge,* 403 U.S. 88, 101 (1971), held that § 1985(3) could reach private conspiracies where racial discrimination is alleged. However, the specific constitutional sources of power relied on in *Griffin* were the Thirteenth Amendment and the Commerce Clause right of interstate travel. Since neither of these constitutional rights is a limitation on state power, no allegation of "state action" was required. However, where the Fourteenth Amendment forms the basis of a private cause of action under § 1985(3), as in the instant case, such Fourteenth Amendment rights may be secured only as against the action of the state. The *Civil Rights Cases,* 109 U.S. 3, 3 S.Ct. 18, 21, 30 (1885);

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Shelley v. *Kraemer*, 334 U.S. 1, 13 (1948); *Evans* v. *Newton*, 382 U.S. 296, 299-300 (1966); *United States* v. *Price*, 383 U.S. 787, 794, 799 (1966); *United States* v. *Guest*, 383 U.S. 745, 755 (1966).

Petitioner would have this Court interpret § 1985(3) as a general federal tort law, a result which this Court has expressly denounced in *Griffin*, *supra*, 403 U.S. at 101-2. Where sex discrimination is alleged, the private conspiracy must aim at a deprivation of equal enjoyment of rights secured by the Fourteenth Amendment, *i.e.*, protection from interference by the action of a state or protection from interference by private individuals at a state facility.

The language of the concurring and dissenting opinions in *United States* v. *Guest*, 383 U.S. 745 (1966) is not inapposite as Petitioner argues. While those opinions suggest that Section 5 of the Fourteenth Amendment empowers Congress to enact laws punishing all conspiracies which interfere with a Fourteenth Amendment right, the Fourteenth Amendment right referred to was "the right to equal utilization of *state facilities*." (Italics supplied) *United States* v. *Guest*, 383 U.S. at 761 and 777. The language in those separate opinions in *Guest* does not suggest that Section 5 of the Fourteenth Amendment could reach wholly private conspiracies to deprive an individual of the right to equal utilization of a *private* facility. State involvement is key to triggering the protection of the Fourteenth Amendment. The decision in *Guest* is consistent with the holding in *United States* v. *Price*, 383 U. S. 787, 799 (1966), decided by this Court on the same day, that the Fourteenth Amendment only protects against state action.

Members of this Court have indeed differed as to the scope of Section 5 of the Fourteenth Amendment. But not one member has suggested that it authorizes a general federal tort law. "As we have consistently held 'The Four-

teenth Amendment protects the individual against *state action*, not against wrongs done by individuals.' *Williams I*, 341 U.S. at 92 . . . ." *United States* v. *Price*, 38 U.S. 787, 799 (1966). In *United States* v. *Guest*, 383 U.S. 745 (1966), Mr. Justice Brennan stated that a majority of the members of this Court were expressing the view that Section 5 empowered Congress ". . . to enact laws punishing *all* conspiracies to interfere with the exercise of Fourteenth Amendment rights . . . ." (383 U.S. at 782) But not one member of this Court has suggested that a private employer's alleged discrimination in determining whom he shall employ violates a Fourteenth Amendment right.

No matter how broadly the reach of Section 5 has been construed in the past, Petitioner's claim that all forms of private discrimination are thus made illegal is clearly unsupported.

The court below was correct in holding that while state participation *in the conspiracy* need not be alleged, the conspiracy must deprive Petitioner of a federally protected right which would attain "if IIT were a State university, or if the constitutional right of the plaintiff at stake were one that is entitled to protection against anyone, rather than merely protection from impairment by a state." (524 F.2d 818, at 828, Petition App., pp. 12a-13a). The decisions of this Court are not inconsistent. Because Petitioner has failed to allege any state involvement in the challenged action, the dismissal of her complaint was proper.

There is, therefore, no reason for this court to grant the Petition.

3.

Petitioner Has Other Remedies

Petitioner has argued extensively that if this Court fails to grant her Petition and sustain her appeal, she will have no effective remedy for the alleged discriminatory conduct (Petition, pp. 16-21). By her own admission, however, Petitioner has asserted that state court and federal agency claims are available to her. While she deprecates their utility, she does not deny their existence.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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MAR 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1154

HELEN A. COHEN,

Petitioner,

vs.

ILLINOIS INSTITUTE OF TECHNOLOGY, an Illinois not-for-profit corporation, **JAMES J. BROPHY, JOHN T. RETTALIATA,** and **MAYNARD P. VENEMA,**

Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Far from establishing certainty and correctness in the decision below, respondents' Brief in Opposition underscores the need for certiorari and reversal.

First, in a Brief in Opposition which cites not one single court of appeals decision, respondents ignore the demonstrated conflicts among the Circuits regarding a nexus under 42 U.S.C. § 1983 and the scope of 42 U.S.C. § 1985(3).[1]

Second, in urging that the *Cohen* decision conforms to decisions of this Court under 42 U.S.C. § 1983, respondents insist that there be a nexus between significant state subsidies and private discrimination. This is legally untenable, logically fallacious, and economically impossible.

Third, in contending that *Cohen* correctly applied the permissible scope of 42 U.S.C. § 1985(3), respondents continue to overlook Section 5 of the Fourteenth Amendment. Their "law" is some ten years out of date.

And fourth, in suggesting that civil rights responsibilities be passed onto state courts and federal agencies, respondents disregard the lamentable ineffectiveness of both.

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[1] Inter-Circuit conflicts under § 1985(3) have recently received additional attention. *See McLellan v. Mississippi Power & Light Co.*, 526 F. 2d 870, 880, n. 20 (5 Cir. 1976). Estreicher, *Federal Power to Regulate Private Discrimination; The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 450-527 (1974); Roth, *Private Interference with an Individual's Civil Rights: A Redressable Wrong under § 5 of the Fourteenth Amendment?* 51 NOTRE DAME LAWYER 120-40 (1975); Note, *Constitutional Law—Civil Rights—Absent State Involvement, Right of Association Not Protected by 42 U.S.C. § 1985(3)*, 9 U. RICHMOND L. REV. 753-9 (1975).

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RESPONDENTS FAIL TO ACKNOWLEDGE INTER-CIRCUIT CONFLICTS

Where the respondents do a real disservice to the Court is in their failure to acknowledge the inter-Circuit conflicts under both § 1983 and § 1985(3). Their Brief in Opposition is perhaps unique in that it fails to cite so much as one court of appeals decision—urging instead that "the decision below is in accord with decisions of this Court."

Rule 19(b) of this Court indicates the appropriateness of review on certiorari "[w]here a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter." Resolving such conflicts "is a prime function of this Court's certiorari jurisdiction," *Bailey v. Weinberger*, 419 U.S. 953 (1974) (dissent from denial of petition).

The *Cohen* court, although endeavoring to distinguish *Weise v. Syracuse University*, 522 F. 2d 397 (2 Cir. 1975), on the facts, recognized the basic conflict between *Weise* and *Cohen* as to the sufficiency of allegations in a complaint brought under § 1983 (App. 11a).

The *Cohen* court likewise candidly recognized that its interpretation of § 1985(3) differs from that of five other Circuits (App. 14a, n. 31; 15a, n. 33; see Petition pp. 12-16).

Yet the respondents' response is silence.

"SIGNIFICANT" STATE AID *IS* STATE ACTION UNDER 42 U.S.C. § 1983

Respondents take issue with our position that the decision below is contrary to *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and to other decisions of this Court. They argue (1) that all factors of state involvement must be weighed under § 1983, (2) that there is no actual conflict, and (3) that *Burton* and other cases hold that where state involvement takes the form of significant aid there must be a nexus between the aid and the discriminatory acts.

We agree with the first point, but certainly not with the second or the third.

With all due respect to the respondents, *Cohen* is irreconcilable with *Burton*. No nexus whatever existed in *Burton* between the state's participation and the discrimination. Had the *Burton* Court required this, Blacks would still be waiting for service outside the Eagle restaurant in the Parking Authority building. Yet the *Cohen* complaint was held insufficient for failing to allege it.

In point of fact, on at least two occasions, this Court has specifically denied the need for demonstrating a nexus between state support and private discrimination to invoke § 1983—even when the involvement is not in the form of a cash subsidy. *See Reitman v. Mulkey*, 387 U.S. 369, 380 (1967) ("the State neither commanded nor expressly authorized the discriminations"); *Gilmore v. City of Montgomery*, 417 U.S. 556, 581 (1974) (Mr. Justice White, concurring: "To violate the Equal Protection Clause the State need not make, advise or authorize the private decision to discriminate that involves the State. . . .").

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Respondents then deprecate what they say is a "new rule of law" (Respondent's Brief p. 8)—"whenever 'significant' government aid is provided an employer, its actions are, *ipso facto*, state actions." This *is* the law where discrimination is concerned;[2] once the *Cohen* court concluded that "significant" state support had been alleged, it should have gone no further than to reverse and remand.

"Significant" state aid—beyond "such necessities of life as electricity, water, and police and fire protection," *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 173 (1972)—furnished to a discriminatory institution is, by definition, "state action". This is what "state action" is all about.

Economically, a "nexus" between significant state subsidies and private discrimination is a meaningless concept. Money is fungible. Once paid into an institution's general fund, it cannot be followed thereafter. Either the state aid inherently—and inevitably—supports the discrimination, or requiring that the aid be traced into the salary checks of the discriminatory perpetrators is sending a plaintiff on a fool's errand. *Norwood v. Harrison*, 413 U.S. 455, 464-465 (1973), held the former: "if the school engages in discriminatory practices the State by tangible aid . . . *thereby* gives support to such discrimination" (emphasis added). The *Cohen* court required the latter.

Finally, respondents profess to see unworkable vagaries in a state action test of "significant" support (Respondent's Brief at p. 7). They apparently have

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[2] "[T]here is a peculiar offensiveness when citizens are required to pay taxes 'for purposes whence they or their children are excluded.' " Friendly, J., in *Grafton v. Brooklyn Law School*, 478 F. 2d 1137, 1142, n. 12 (2 Cir. 1973).

overlooked the fact that this Court and the Seventh Circuit have both adopted that test *in haec verba: Norwood v. Harrison*, 413 U.S. at 467 ("A state's constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination."); *Doe v. Bellin Memorial Hospital*, 479 F. 2d 756, 762 (7 Cir. 1973) (" 'We believe that affirmative support must be significant, measured either by its contribution to the effectiveness of defendant's conduct, or perhaps by its defiance of conflicting national policy, to bring the statute [§ 1983] into play.' ")

RESPONDENTS, AND THE COURT BELOW, HAVE OVERLOOKED SECTION 5 OF THE FOURTEENTH AMENDMENT

Respondents' argument regarding the constitutional reach of 42 U.S.C. § 1985(3) is an anomalous one. If their argument fairly summarizes the holding of *Cohen* on the point, the ~~petitioners~~ respondents have confessed error below.

Their position briefly stated is that "where the Fourteenth Amendment forms the basis of a private cause of action under § 1985(3), as in the instant case, such Fourteenth Amendment rights may be secured only as against the action of the state" (Respondent's Brief p. 8). In support, they cite six decisions of this Court, the most recent of which are *United States v. Price*, 383 U.S. 787 (1966), and *United States v. Guest*, 383 U.S. 745 (1966).

Unfortunately for the respondents, the law has progressed well beyond *Price* and *Guest*. Indeed, the Opinion of the Court in *Guest* expressly stated that "nothing said in this opinion goes to the question of what kinds of other and broader legislation Congress might

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constitutionally enact under § 5 of the Fourteenth Amendment to implement [the Equal Protection] clause" (383 U.S. at 755). In 1973, this Court reaffirmed what was by that time an accepted truism; a statement that the Fourteenth Amendment is applicable only to state conduct was qualified by the caveat that "this is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment." *District of Columbia v. Carter*, 409 U.S. 418, 424, n. 8 (1973).

Two months after *Price* and *Guest* this Court decided *Katzenbach v. Morgan*, 384 U.S. 641 (1966), which announced the reawakening of § 5. Section 5 confers on Congress the "same broad powers expressed in the Necessary and Proper Clause" (384 U.S. at 650). It held:

> "Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." (384 U.S. at 651)

Of similar effect were *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (enforcement clause of Thirteenth Amendment), and *Oregon v. Mitchell*, 400 U.S. 112 (1970).

Then, when this Court, in *Griffin v. Breckenridge*, 403 U.S. 88 (1971), eliminated the state action requirement of § 1985(3), it invited attention to possible support under § 5 of the Fourteenth Amendment—specifically calling attention to *Katzenbach*, *Oregon*, and the concurring opinions in *Guest* (403 U.S. at 107).

Those decisions in six other Circuits (Petition, pp. 14-16) which are contrary to *Cohen* on the scope of § 1985(3) were not rendered precipitously. The courts there were certainly aware of the constitutional limitations of

§ 1985(3). At least ten courts have squarely held that the statute could reach private conspiracies—four relying specifically on Section 5 of the Fourteenth Amendment.

In short, when the respondents argue that *Price* and *Guest* are controlling on the scope of § 1985(3) under the Fourteenth Amendment, they overlook the facts that this Court did not pass on the point in *Price* and *Guest*, but instead held this not to be the law in *Katzenbach* and later cases. Thus, in making this argument based on *Price* and *Guest*, and in urging that *Cohen* was correctly decided on those cases, respondents are conceding error in *Cohen*.

PETITIONER HAS NO EFFECTIVE ALTERNATIVE REMEDY

In contrast to our demonstration in the Petition (pp. 16-21) that alternative civil rights remedies are inutile, respondents make the unsupported assertion that petitioner has state court and federal agency remedies.

The record speaks for itself. Petitioner filed charges with HEW on or about August 31, 1971. On January 9, 1974, HEW made its finding of reasonable cause. It is now March 1976, and nothing further has happened.

And all the while, respondents are currently enjoying well over $20.8 million per year in federal contracts[3], and an unknown[4] but certainly extensive amount of state

[3] CHEMICAL WEEK, May 7, 1975, p. 51.

[4] "If Cohen is without sufficient facts to warrant specific pleadings in this case, she should not have brought the Complaint in the first place." Brief for Defendants-Appellees, in the United States Court of Appeals for the Seventh Circuit at p. 20.

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aid and contracts—and brazenly asserting that the courts are powerless as it is immaterial "whether Plaintiff is an incompetent, paranoiac or a beleaguered victim of sexism."[5]

CONCLUSION

The Court should grant the writ.

Respectfully submitted,

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[5] Defendants' Reply Memorandum in Support of Their Motion to Dismiss, in the United States District Court for the Northern District of Illinois at p. 2.